82-1081

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. _____

ESTATE OF WILLIAM A. FRIEDERS, DECEASED,
ELMER FRIEDERS, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE
SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Could the Tax Court consider 5 sales of property having "special value" to the Buyer as any evidence of market value?

Could the Tax Court consider Illinois tax assessment records as any evidence of market value?

Did the Tax Court abuse its discretion in denying the taxpayer leave to file his motion to vacate and/or revise decision?

PARTIES

Caption in this cause contains the name of all parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit filed August 30, 1982 and reported at 678 F2d 224, appears at page 1a of the Appendix; the opinion in the Tax Court, reported at 40 T.C.M. 403 is reproduced at page 9 a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 30, 1982. A timely petition for rehearing was denied on September 23, 1982, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

STATEMENT OF CASE

Page references are to pages of the transcript.

William Frieders died on May 14, 1973, leaving an estate which included a ninety-two acre family farm. His estate valued the farm at $2,000 per acre. The Commissioner assessed a value of over $5,000 per acre. The estate brought this action in Tax Court, seeking a redetermination. At the trial, the Commissioner took the position that the farm was worth $5,000 per acre.

The Frieders' farm is located in DuPage County, Illinois, about thirty miles west of Chicago. There was invest--ment activity in the area at the time of Frieders' death, including activity by the Crown family of Chicago. The Crowns, acting through trusts, bought 4,000 acres

of property near the Frieders' farm.

The Government presented one expert witness, Donald Neuses, who relied primarily on the selling prices of six properties near the Frieders'farm. Five of the six properties were bought by the Crowns as part of an assemblage, and the price per acre of the five properties ranged from $5,693 to $7,653. (Appendix-pp 12a - 16a). The Government, over objection, introduced assessment records which placed on the Frieders' farm a fair market value for real estate tax purposes of $4,986 per acre for 1972. (pp 231-234).

The taxpayer presented three witnesses. Gerald Anderson, the real estate broker for the Crown family, testified that the Crown family purchased 4,000 acres of property along the corridor of the proposed Fox Valley Freeway. They

began in late 1969 and concluded in 1973. (pp 101, 102 and 122). They began acquiring property along Route #34, Ogden Avenue, and gradually began to move north along the freeway. The last parcels of property were acquired near the Frieders' farm. There was a perception among potential sellers as to the existence of acquisition activity in the area. (pp 102-109). He had tried to acquire the Frieders parcel together with two other adjoining parcels as one package. The Crown group wanted to acquire the three parcels as a package for about $6,000.00 per acre. But the owners came back with a lot bigger numbers. The whole thing just fell apart. (pp 157-160). The Crown family stopped its acquisition activity in 1973. (p 123). Five of the six parcels relied upon by the government were part of the Crown Assemblage.

Each of the five parcels were acquired from unwilling sellers. They did not have the property on the market. (pp 114-122).

Wilton Battles, a land planner, testified as to the lack of comparability between the Frieders' farm and the Neuses comparables. (pp 54-62). He further testified that the Frieders' farm for land development purposes, is an extremely marginal piece of property because its soil types are not suitable for septic systems and public sewer and water was not available. (p 41). It has no road frontage except for a road that dead ends to the Frieders' property. (p 52).

Another witness testified that the value of farmland throughout Illinois increased by 241 percent between 1973 and 1979. (p 98). The estate offered, as a

comparable, a parcel of property directly west of the Frieders' property. It was sold on contract in December of 1971 as two separate parcels at $3,000 and $3,200 per acre. The parcels to the west had 800 feet of road frontage on Reckinger Road and had access to sewer and water. (pp 130-135).

The Tax Court found that the fair market value of the Frieders' farm was $5,000 per acre. The court relied principally on the testimony and report of the Government's witness, Donald Neuses. (Appendix - pp 42a - 43a).

The court filed its Memorandum Findings of Fact and Opinion on May 27, 1980. On December 20, 1980, more than seven years after the death of William Frieders, the Frieders' farm was sold for $5,000 per acre. The Tax Court decision was not entered until July 23,

1981, because of the time it took to compute the deficiency pursuant to Tax Ct. R. 155. On October 13, 1981, the estate submitted a motion to vacate or revise the decision, (Appendix pp 44a - 57a), based on the evidence of the actual sale price of the Frieders' farm. The Affidavits submitted with such Motions set forth that the sale took place only after:

A. The City of Aurora, in 1980, adopted a plan to build a road that would provide the Frieders' property with over 1,000 ft. of road frontage, and (Appendix - pp 46a).

B. The Aurora Sanitary District, in 1980, pursuant to a mandate of the local circuit court, revised its plans to provide sewer and water service to pro-

perty to the east, including the Frieders' property. (Appendix pp 46a).

In 1980, prior to such changes, Frieders received only one oral offer to purchase the property for the sum of $300,000 ($3,271 per acre). (Appendix - pp 52a). Prior thereto, in 1979, the property was also on the market. Frieders received no offers in 1979. (pp 126-130).

The Tax Court denied Leave to File the Motion. (Appendix - p 58a).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH ILLINOIS AND TAX COURT DECISIONS THAT HOLD THAT SALES THAT HAVE A "SPECIAL VALUE" TO THE BUYER ARE NOT ADMISSIBLE AS EVIDENCE OF MARKET VALUE.

A sale with special value to the buyer, such as a key sale in an assemblage, is not a "comparable" sale and is not admissible as evidence of market value. Henry Finck Co., 4 BTA 1188, (1926); Department of Transportation vs. Prombo, 63 Ill. App. 3d 407, 379 N.E. 2d 953, (3d Dist. 1978); Trustees of Schools of TP., etc. vs. Chicago City B & T Co., 126 Ill. App. 2d 302, 262 N.E. 2d 80 (1970).

In Finck, appreciation in value of land between 1913 and 1918 was an issue. In cross-examination, counsel for the Commissioner elicited the fact

that Henry Finck bought 429.24 acres of delta land in 1913 for $78.54 per acre, and that in 1918, he sold 102 acres of that tract at $150 per acre. In redirect examination counsel for the petitioner established that the parcel sold was situated at least seven miles from the property of the petitioner, and that the purchaser was willing to pay more than market value because he needed that acreage for the construction of ditches necessary to the economic completion of irrigation and drainage works on a much larger adjacent tract that he owned at that time. The Tax Court held:

> "To our minds, this transaction is without probative value to support the contentions of the Commissioner." 4 BTA 1188, at 1191.

In Department of Transportation vs. Prombo, the State Department of Transportation appealed an award of compensation in an eminent domain case. It argued that the testimony of the condemnees appraisal witness should be stricken because his valuation of the subject property was based on sales which were part of an assemblage having a special value to the buyer.

The appraiser had used as comparables four parcels of property purchased by a bank for a parking lot. The first three properties (one in January, 1972, and two in September, 1972), were purchased for $7.61 per square foot, $7.14 per square foot and $6.79 per square foot, respectively. However, the last parcel purchased, completing the assemblage in September, 1973, cost $15.90 per square foot. The Court held:

> "It is apparent that the bank, having acquired three of the four properties, placed a "special value" on this property and was forced to pay a premium. This sale is not comparable and should not have been admitted into evidence." 379 N.E. 2d 953, at 957.

In Trustee of Schools, the lower court had allowed into evidence the sale of four 25 foot lots that had been purchased by an adjoining property owner for the purpose of enlarging his laundry and making a parking lot. The Appellate Court, in reversing, held that the "special value" placed upon the property by the adjoining owner, prevents the sale from being a similar sale as contemplated by the rules.

The Court of Appeals in affirming the Tax Court, speculated that the Tax Court "assumed that assemblage purchases bring higher prices. (Appendix - p 6a). However, the Tax Court did not have the right to even consider such evidence. The

evidence was not admissible. The three cases previously cited by the taxpayer clearly state that such evidence is not admissible.

In Finck, the Court held:

> "To our minds, this transaction is without probative value to support the contentions of the Commissioner". 4 BTA 1188, at 1191.

In Department of Transportation vs. Prombo, the Court held:

> "This sale is not comparable and should not have been admitted into evidence". 379 N.E. 2d 953, at 957.

In Trustees of Schools, the Court reversed holding:

> "The error in considering the sale was prejudicial". 262 N.E. 2d 80, at 82.

It is also clear that the Tax Court never "assumed" that assemblage purchases bring higher prices. The Tax Court specifically found that "These were all bona fide sales between willing sellers and willing buyers." (Appendix - p 13a). It rejected the

contention "that the sales of five of the six parcels used as comparables by Mr. Neuses involved "unwilling sellers". (Appendix - p 34a).

The uncontradicted testimony at trial was that five of the six comparables relied upon by Mr. Neuses, the government appraiser, were sales that had a "special value" to the buyer.

The broker, Anderson, testified that five of the six parcels relied upon by Neuses were purchased by the Crown group from sellers who did not have their property on the market. The procedure he used would be to go to these prospective sellers and ask them if they would entertain an offer. In many cases, they would say "no". He would attempt to create a need for them to move out of the area. He would go out and find trade farms for them. If they didn't like one

because of the farm, he would go out and find another farm with the right kind of barn on it and go back to them again and again. It involved many personal visits and just traveling all over the country, trying to find them some place to better their income flow or their cash flow. He would have to contact the average seller about 20 or 25 times. (p 114-115).

In acquiring parcel 6, Anderson flew to Dallas six times to talk to Mr. Timmons about selling. They weren't interested in selling. Timmons flew into Aurora, calculated what he thought would be the value of the land in the future, and came up with a figure of $7,400.00, take it or leave it. Anderson took it. (p 115-116).

Parcel 12 involved negotiating with three partners. (Transcript p 118). Acquiring parcel 11 involved negotiating

between 8 months and a year. Mr. Lorenz eventually sold the parcel after we found him a farm west of Route 47. His wife liked the brick home and the size of the farm. She talked him into selling it and moving out there. (p 119).

Parcel 14 was acquired to give continuity to the north portion of the Crown Assemblage to the City of Aurora. We had to pay extra to get that parcel away from the family. (Transcript p 120). Parcel 15 was acquired to gain access to Route 65 for the Crown Assemblage. Parcels 6, 11, 12, 14 and 15 were all acquired from unwilling sellers. (p 120-122).

These sellers only sold the property when their will not to sell was overcome by the persistence of Gerald Anderson, the broker for the Crown family. Their desire not to sell was overcome by a price substantially above

the market.

It is clear that the above five comparables relied upon by Mr. Neuses, the government's appraiser, involved sales that had a "special value" to the buyer. The sales did not involve willing sellers, i. e., persons who "desired" to sell their property. 429.59 Acres of Land. 612 F 2d 459, at 462 (9th Circ. 1980).

The Tax Court, in its Finding of Fact, indicated that it relied principally upon the appraisal report and testimony of Neuses. (Appendix - p 42a). Five of these were not admissible as "comparable" sales.

It is respectfully suggested that the Tax Court erred in relying upon the Neuses appraisal report and testimony. The decision of the Court of Appeals affirming the Tax Court should be reversed.

II

THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH ILLINOIS AND FEDERAL DECISIONS THAT CLEARLY HOLD THAT ASSESSMENT RECORDS ARE INCOMPETENT EVIDENCE OF VALUE.

Illinois decisions have consistently held that the assessed valuation of the property as shown on the Assessor's books is incompetent. County of Mercer v. Wolff, 237 Ill. 74, 81, 86 N.E. 708, 711 (1908), Lewis v. Englewood Elevated R.R. Co., 223 Ill. 223, 79 N.E. 44 (1906); City of Chicago v. Building Corp., 11 Ill. 2d 431, 143 N.E. 2d 40 (1957); Dept. of Public Works v. Cohen, 9 Ill. App. 3rd 85, 291 N.E. 2d 883 (3rd Dist. 1972).

In the cause before this Court, the government offered into evidence the certified assessment records of the Township Assessor of Naperville. The Assessor was not called as a witness. (pp 231-232). The records were allowed

into evidence over objection.

The Tax Court erroneously relied upon such evidence. In its Memorandum Findings of Fact and Opinion, it concluded its findings of fact with the following paragraph:

> "The Frieders' property (exclusive of improvements) was determined in 1972 to have a fair market value for DuPage County real estate tax purposes of $458,712 or $4,986.00 per acre." (Appendix - p 21a).

The Court of Appeals in this cause held that the assessment records were material.

> "However, under Illinois law at the time of Frieders' death, assessment records could be material. An Illinois statute required that property be assessed at its "fair cash value," Ill. Rev. Stat. ch.

120 §§ 501(1) (1971), and defined "Fair cash value" as fifty percent of the actual value. Id at §§ 482 (24). In light of this statutory requirement, the assessed value would be material." (Appendix - p 6a).

This holding is in conflict with all Illinois decisions as to the materiality of assessment records as evidence of market value.

The County of Mercer decision simply finds such evidence to be incompetent:

> "The appellants offered to prove by the assessor's book the assessed value of the property for 1907. The evidence was incompetent. The assessor might have testified to his judgment of its value but the

amount at which he assessed it was immaterial." (237 Ill. 74, at 81).

City of Chicago v. Building Corp. held:

"The determination of assessed value, being for a different purpose, is not a fair criterion of its fair cash market value. Both reason and weight of authority are against the competency of this evidence." 11 Ill. 2d 431, at 439.

In Lewis v. Englewood Elev. R.R. Co., the Illinois Supreme Court held:

"The assessor himself might have been a competent witness, but his statement of value as shown by a tax receipt was not competent. Both reason and the weight of authority are against the

competency of this evidence."

223 Ill. 223, at 228.

At about the time of the assessment in question, the Illinois Appellate Court in Dept. of Public Works v. Cohen, held:

> "It is common knowledge that property is not assessed for tax purposes as its true market value but instead for the purpose of satisfying the revenue demands of various tax supported bodies."
>
> 291 N.E. 2d 883, at 886.

The language in the case of United States v. Certain Parcels of Land, 261 F. 2d 287, (4th Cir. 1958), while referring to assessed valuation, is applicable in the instant case;

> "Aside from the general unreliability of tax assessments as an indication of market value, which

ought to make them suspect in any case, the assessing officials are representatives of the public. The power of a tax official to bind the public is limited, and what he does for purposes of taxation, should not be binding upon the public, or prejudicial to the public interest, when other public officials are engaged in the performance of a very different public function in an unrelated field. Though the tax official may purport to use market value as the criterion of assessed value, his primary concern is with relative, not absolute, values. ***." 261 F 2d 287, at 291.

There is no authority for the Court's finding that assessment records are material evidence of market value.

III

THE TAX COURT ABUSED ITS DISCRETION IN DENYING THE TAX PAYER LEAVE TO FILE HIS MOTION TO VACATE AND/OR REVISE DECISION

The Tax Court should exercise its discretionary power under Rule 162 and grant the tax payer leave to file a proper new evidence motion beyond the thirty day period. Brannon's of Shawnee, Inc., vs. Commissioner, 69 T.C. 999 (1978).

The trial in the Tax Court took place on December 11, 1979. On May 27, 1980, the Honorable Judge Dawson filed his Memorandum of Findings of Fact and Opinion. (Appendix - p 9a). On December 20, 1980, Frieders sold the property in question for $5,000 per acre. (Appendix p 56a). On July 23, 1981, the Tax Court, pursuant to

Rule 155 computation, entered its decision in this cause.

On October 15, 1981, the Tax Court entered an Order denying Frieders leave to file his Motion to Vacate and/or Revise Decision received by the Clerk of the Tax Court on October 13, 1981. (Appendix pp 58a - 59a).

The United States Court of Appeals found no abuse of discretion by the Tax Court. However, it did comment on the importance of the new evidence.

> "This issue is important because, if the property was worth $5,000 per acre in 1980, one would consider it unlikely that the property was worth $5,000 per acre in 1973, in view of the substantial, continuing inflationary status of the economy between 1973 and 1980. Nevertheless, we cannot say that the court abused its discretion." (Appendix - p 7a).

Frieders' Motion to Vacate and/or Revise Decision met all of the criteria for a proper new evidence motion and should have been considered by the Tax Court. The evidence presented by Frieders that he sold the subject property in December of 1980 for $5,000 per acre dramatically established that the subject property was not worth $5,000 per acre in May of 1973. There was evidence presented at trial that Illinois farm land was worth 341% as much in 1979 as it was in 1973. (p 97). In addition, the new evidence demonstrated that Frieders was able to secure $5,000 per acre for his farm only after it was published in the fall of 1980 that a proposed road had been scheduled along the southern boundary of the Frieders' farm and that sewer and water was available to the farm as a result of

a Declaratory Judgment which ordered that the Waubonsie service area be expanded to the east.

The new evidence is admissible and credible and of such a nature as will probably change the outcome. Krock vs. Elec. Motor & Repair Co., (CA. 1st, 1964), 339 F2d 73. It is respectfully suggested that the Tax Court abused its discretion in failing to consider the foregoing relevant evidence.

CONCLUSION

It is respectfully suggested that the decision of the Tax Court was clearly erroneous because the Tax Court:

(a) Primarily relied upon the Neuses' appraisal report and testimony. This appraisal report and testimony erroneously considered five sales that had "special value" to the buyer from sellers who did not have their property on the market, and,

(b) Relied upon assessment records which is not any evidence of value.

The United States Court of Appeals on three occasions in its Opinion, (Appendix - pp 2a, 6a & 8a), refers to the fact that the Frieders' farm apparently could have been sold in 1973 for $6,000 per acre as part of an assemblage. Such an offer is not evidence of market value. It is only

evidence of what the Crown family was willing to pay in 1973 to complete its assemblage. The fact that Frieders did not pursue the proposal to purchase at about $6,000 per acre, is only evidence of a bad business judgment. He should not be punished for electing to retain his family farm. The additional tax ($131,659.67) sought by the government would be a heavy penalty for his bad business judgment. (Appendix - p 60a).

The injustice of the Tax Court finding is illustrated by the fact that Elmer Frieders was able to sell his property for $5,000 an acre in 1980. This sale was accomplished only after the property had been on the market for a long period of time, after sewer and water became available to the property in 1980 and after a proposed road (1980)

would give the Frieders property substantial road frontage in the future. In addition, all of the witnesses, including Mr. Neuses, (p 221), testified that there has been a tremendous appreciation of value of farm land in the Fox Valley corridor.

It is respectfully submitted that the Tax Court decision is clearly erroneous - is clearly unjust. For these reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Dated, December 22, 1982.

Respectfully submitted,

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